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22 UNITED STATES DISTRICT COURT
23 NORTHERN DISTRICT OF CALIFORNIA

SK

24 DR. MUHAMMAD MIRZA and
25 ALLIED MEDICAL AND DIAGNOSTIC
26 SERVICES, LLC,

27 Subpoenaing Parties,

28 vs.

YELP, INC.,

Subpoenaed Party.

CV 19 80 146 MISC

Case No.:

(Case No. 1:18-cv-06232-LAP Pending in
Southern District of New York)

**NOTICE OF MOTION AND MOTION TO
ENFORCE COMPLIANCE WITH THIRD
PARTY SUBPOENA**

Hearing Information

Date: TBD

Time: TBD

Courtroom: TBD

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PLEASE TAKE NOTICE that, as soon as counsel may be heard before the assigned judge at the assigned time in the assigned department, the Subpoenaing Parties, Dr. Muhammad Mirza, MD, ("Dr. Mirza") and Allied Medical and Diagnostic Services, LLC, ("Allied Medical", collectively with Dr. Mirza, "Plaintiffs," "Movants," or the "Subpoenaing Parties") by and through their attorneys Thoits Law, will and hereby does move this Court for an Order compelling Subpoenaed Party, Yelp, Inc. ("Yelp"), to comply with the third party subpoena and request for documents issued by Plaintiffs. This motion is based upon this Notice of Motion, the supporting Memorandum of Points and Authorities, the accompanying Declaration of Justin Mercer, Esq., and the exhibits attached thereto, and such other written or oral argument as may be presented at or before the time this motion is taken under submission by the Court.

Pursuant to Federal Rule of Civil Procedure 45, Plaintiffs respectfully request an order requiring Yelp to comply in full with the subpoena served on it in the underlying litigation, Case No. 1:18-cv-06232-LAP, pending in the United States District Court for the Southern District of New York.

Dated: May 30, 2019

By: 
MICHAEL HSUEH
Attorneys for Subpoenaing Parties

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 **PRELIMINARY STATEMENT AND ISSUE TO BE DECIDED**

4 Plaintiffs brought the underlying action on July 10, 2018 against “John Doe” Defendants
5 for defamation and tortious interference stemming from certain anonymous and defamatory
6 reviews (the “Defamatory Reviews”) posted on the website Yelp.com (“Yelp”). Plaintiffs first
7 moved for leave in the underlying action to conduct expedited discovery aimed at identifying the
8 John Doe defendants (“Defendants”) so that they might be named and served. After Plaintiffs’
9 request was granted, Plaintiffs then issued a subpoena to Yelp seeking information to enable
10 them to identify and serve the Defendants. After multiple attempts to meet and confer, Yelp
11 produced documents sufficient to identify the IP addresses and email addresses of *some* of the
12 Defendants, associated with three of Defendants’ Yelp user accounts. However, Yelp further
13 objected to producing any additional information as to the remaining Defendants associated with
14 the eight other Yelp user accounts identified in the Complaint in the underlying matter.

15 The issue for the Court do decide is whether this Court should enforce full compliance
16 Plaintiffs’ subpoena to non-party Yelp, Inc., which seeks limited and specific information about the
17 identity of the author(s) of quasi-anonymous online “reviews,” which is necessary and essential for
18 Plaintiffs to proceed with their underlying lawsuit, and where Plaintiffs have and can satisfy the
19 elements of the *Highfields* test developed by the Northern District of California and applicable
20 here.

21 **RELEVANT BACKGROUND FACTS**

22 This motion arises out of a federal lawsuit pending in the Southern District of New York.
23 See First Amended Complaint (“FAC”), annexed to the Declaration of Justin Mercer, Esq.
24 (“Mercer Decl.”) as **Exhibit A**. The Plaintiffs in the underlying lawsuit are Dr. Muhammad Mirza,
25 MD, (“Dr. Mirza”) and Allied Medical and Diagnostic Services, LLC, (“Allied Medical”,
26 collectively with Dr. Mirza, “Plaintiffs,” “Movants,” or the “Subpoenaing Parties”). Through
27 some discovery obtained herein, as further explained below, Plaintiffs amended their complaint to
28 identify some of the John Doe defendants. See Second Amended Complaint (“SAC”), annexed to

1 the Mercer Decl. as **Exhibit B**. The facts relevant to this motion are set forth in the pleadings in
2 the underlying action (annexed hereto) and specifically Second Amended Complaint. Plaintiffs
3 respectfully refer the Court to those pleadings for a full recitation of the facts and circumstances.
4 Certain relevant facts are reiterated herein.

5 Dr. Mirza operates a successful and respected medical practice, Allied Medical. Dr.
6 Mirza is board-certified in internal medicine, is licensed to practice medicine in New York and
7 New Jersey, and has decades of experience practicing medicine, and specifically relevant here,
8 elective treatments for cosmetic applications. See SAC at ¶¶ 13-19; see also Affidavit of Dr.
9 Mirza ("Mirza Aff."), annexed to the Mercer Decl. as **Exhibit F**.

10 As part of Dr. Mirza's medical practice, he offers injections of Botulinum toxin A,
11 commonly known as (and hereinafter referred to as) "Botox," manufactured by Allergan PLC. (See
12 SAC at ¶ 18). Botox has various medical applications, but most patients seek out elective
13 treatments for cosmetic applications. (See SAC at ¶ 19). As with many cosmetic treatments,
14 patients often find that the results of Botox injections do not live up to their expectations. (See
15 SAC at ¶ 20). While most of Plaintiffs' patients have shared their opinions in a lawful and
16 reasonable manner, a handful of disgruntled Botox patients have chosen to voice false and
17 defamatory accusations on Yelp, as described below. (See SAC at ¶ 21).

18 Beginning on or around September 15, 2017, Defendants created, or caused to be created,
19 the first in a series of false and defamatory "reviews" on Plaintiffs' profiles on the website
20 Yelp.com, hijacking Plaintiffs' own commercial advertising for their services to create negative
21 ads that denigrate Plaintiffs' business and character ("Defamatory Reviews"). Between that time
22 and the filing of the First Amended Complaint, at least eleven (11) such Defamatory Reviews
23 have been posted to Plaintiffs' Yelp.com pages. (See FAC at ¶¶ 20-96; see also SAC at ¶¶ 22-
24 96). Plaintiffs alleged evidence that Defendants were and are publishing false statements to third
25 parties accusing Dr. Mirza of practicing and engaging in "fraud" by *inter alia* using "fake botox"
26 and unlawfully mixing improper chemicals or "filler" with his injections for cosmetic
27 applications, being a "scam artist," and, not actually being a licensed medical doctor. *Id.* All the
28 Defamatory Reviews were posted on Yelp.com, however, and Yelp.com would have the

1 information and/or documents in their possession, custody, or control which are necessary to
2 positively identify the Defendants. *Id.*

3 As a result, on or about July 10, 2018, Plaintiffs filed the underlying action in the
4 Southern District of New York against the anonymous Defendants. *See* Declaration of Justin
5 Mercer, Esq. (“Mercer Decl.”) at ¶ 2. On or about August 1, 2018, Plaintiffs moved for
6 expedited discovery in the matter as Plaintiffs were and are unable to uncover the identity of the
7 Defendants without issuing a third-party subpoena on Yelp. (See Mercer Decl. at ¶ 5, Exhibit C).
8 The underlying court, via order issued by Hon. Loretta A. Preska on or about August 13, 2018,
9 found ‘good cause’ for expedited discovery to determine the identity of the John Doe defendants
10 and determined that Plaintiffs stated a *prima facie* case and were unable to identify the
11 Defendants without a court-ordered subpoena (“SDNY Order”). (See Mercer Decl. at ¶ 6,
12 Exhibit C).

13 Accordingly, on or around August 29, 2018, Plaintiffs issued and served a subpoena
14 *duces tecum* to Yelp with the SDNY Order, annexed to the Mercer Decl. as **Exhibit D**. (See
15 Mercer Decl. at ¶ 7). The subject subpoena directed compliance at Yelp’s preferred location in
16 the Northern District of California. *Id.* On or about September 10, 2018, Yelp replied through
17 their senior corporate counsel with an objection letter of boilerplate objections and refused to
18 supply the information requested (the “Yelp First Response”), annexed to the Mercer Decl. as
19 **Exhibit E**. (See Mercer Decl. at ¶ 8). In the Yelp First Response, Yelp cited to the First
20 Amendment and the Northern District of California’s decision in *Highfields* as a basis for its
21 objections. (See Mercer Decl. at ¶ 9).

22 On September 26, 2018, Plaintiffs’ counsel conferred with Yelp’s counsel by phone to
23 resolve any issues with Plaintiffs’ requests. (See Mercer Decl. at ¶ 10). During that call, Yelp’s
24 counsel suggested that a submission of additional evidence, including in the form of an affidavit
25 from Plaintiffs, could satiate Yelp’s First Amendment and *Highfields* concerns. *Id.* Based on
26 that conversation, Plaintiffs believed that Yelp would produce such information and documents
27 after additional submissions were provided by Plaintiffs’ counsel. *Id.* Accordingly, on or around
28 October 31, 2018, Plaintiffs, through Dr. Mirza, assembled and executed an affidavit detailing

1 (a) the defamatory statements and (b) how such statements were false (the “Mirza Aff.”), see
2 Mercer Decl., **Exhibit F**. On or about November 5, 2018, Plaintiffs provided Yelp with the
3 Mirza Aff. as per Yelp’s counsel’s request. (See Mercer Decl. at ¶ 12).

4 After multiple attempts to confer regarding the additional submission, on or about
5 November 26, 2018, Yelp’s counsel agreed to produce information regarding three of the John
6 Doe Defendants, but refused to produce information regarding the remaining Defendants (the
7 “Yelp Second Response”). (See Mercer Decl. at ¶ 13). When Plaintiffs’ counsel queried as to
8 the basis for Yelp’s withholding of information after receipt of the Mirza Aff., Yelp’s counsel
9 responded that “[t]he declaration provided [by Dr. Mirza] does not set forth a prima facie
10 showing of defamation with respect to any other user.” (See Mercer Decl. at ¶ 14).

11 Then, on or about November 30, 2018, Plaintiffs’ counsel again conferred with Yelp’s
12 counsel by phone in a good faith attempt to resolve Yelp’s concerns. (See Mercer Decl. at ¶ 15).
13 During that call, Plaintiffs’ counsel explained that (a) Judge Preska’s order determined that
14 Plaintiffs had stated a prima facie case for defamation and (b) that, in any event, Dr. Mirza’s
15 supplemental affidavit should have assuaged Yelp’s concerns. (See Mercer Decl. at ¶ 15).
16 However, on that same call, counsel for Yelp explained her client’s position and directed
17 Plaintiffs’ counsel to the *Highfield’s* decision. (See Mercer Decl. at ¶ 15). Notwithstanding that
18 call, counsel for Plaintiffs remained optimistic that Yelp would produce additional information
19 regarding the remaining John Doe Defendants.

20 On or around January 4, 2019, Yelp produced documents sufficient to identify the IP
21 addresses and email addresses of some of the John Doe defendants, associated with the three
22 Yelp user accounts (the “Yelp Third Response”, and collectively with Yelp’s First and Second
23 Response, the “Yelp Subpoena Responses”), annexed to the Mercer Decl. as **Exhibit G**. (See
24 Mercer Decl. at ¶ 16). Based on conversations and negotiations Plaintiffs’ counsel had with
25 Yelp prior to January 4th, Plaintiffs expected Yelp’s production to be more substantial. (See
26 Mercer Decl. at ¶ 17). However, Yelp further objected to producing any additional information
27 as to the remaining John Doe defendants associated with the eight other Yelp user accounts
28 identified in the Complaint. (See Mercer Decl. at ¶ 18). As stated above in parties’ discussions

regarding the Yelp Second Response, Yelp's counsel argued, *inter alia*, that the underlying court's order granting Plaintiffs the authority to issue subpoenas did not formally direct Yelp to produce documents over their objections. (See Mercer Decl. at ¶ 14).

Given the likelihood that Defendants used pseudonyms when they posted on Yelp anonymously (see SAC at ¶¶ 78-84), they used similar language in the posts and the posts occurred around same time (see SAC at ¶¶ 22-96), Plaintiffs hoped that—notwithstanding Yelp’s reluctance to provide specific information about the remaining Does—Plaintiffs’ additional subpoenas issued to the ISPs whose subscribers were assigned the IP addresses identified by Yelp, would identify not only the Does who authored the posts that Yelp did respond to, but other Does as well. (See Mercer Decl. at ¶ 19). In other words, Plaintiffs were reasonably hopeful that they would not have to file a whole new lawsuit in California to discover the other Does’ identities. That said, the subpoena responses from Microsoft, Google and Verizon were only useful to identify the two additional named defendants identified in Plaintiffs’ Second Amended Complaint. (See SAC at ¶¶ 22-28, 78-84).

As such, although productive discussions were had in good faith, counsel for Yelp and Plaintiffs could not resolve the dispute. (See Mercer Decl. at ¶¶ 8-18). Thus, absent further cooperation or disclosure from Yelp, Plaintiffs are now compelled to move to enforce the subpoena in the district where Yelp's compliance was required: the Northern District of California.

LEGAL STANDARD

Rule 45 of the Federal Rules of Civil Procedure provides the framework and mechanisms for gathering documents, information, testimony and tangible things relevant to a pending litigation from non-parties through use of subpoenas. *See* Fed. R. Civ. P. 45. Generally, Rule 26 requires parties to meet and confer prior to commencing discovery. *See* Fed. R. Civ. P. 26(d), (f). However, Rule 26(d)(1) permits a party to conduct discovery in advance of the conference of parties required by Fed. R. Civ. P. 26(f), “when authorized by these rules, by stipulation, or by court order.” Fed. R. Civ. P. 26(d)(1). Courts in the underlying district and others “have applied a ‘flexible standard of reasonableness and good cause’ in determining whether to grant a party’s

1 expedited discovery request.” *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 241 (S.D.N.Y.
2 2012). Good cause exists where, as here, a plaintiff have demonstrated a *prima facie* case and are
3 unable to uncover the identity of the defendant without issuing a third-party subpoena. *See*
4 *adMarketplace, Inc. v. Tee Support, Inc.*, 2013 WL 4838854, at *2 (S.D.N.Y. Sept. 11, 2013)
5 (“Courts . . . have found ‘good cause’ for expedited discovery to determine the identity of John
6 Doe defendants where the plaintiff has stated a *prima facie* case and is unable to identify the
7 defendants without a court-ordered subpoena.”); *see also John Wiley & Sons v. John Does 1-22*,
8 2013 WL 1091315, at *5 (S.D.N.Y. March 15, 2013) (“There is good cause to grant expedited
9 discovery in the instant matters because [plaintiff] has alleged a *prima facie* case of copyright
10 infringement and it cannot identify the John Does without a court ordered subpoena.”); *Next*
11 *Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165, 171 (S.D.N.Y. July 31, 2012).
12 Where a plaintiff has a potentially meritorious claim and no ability to enforce it, courts have
13 found good cause for expedited discovery. *See, e.g., Digital Sin*, 279 F.R.D. at 241.

14 Once good cause is shown (via the threshold demonstration of a *prima facie* case) and a
15 court order is issued pursuant to Rule 26(d)(1), a party proceed to issue subpoenas. Under Rule
16 45(d)(2)(B)(i), the proper court for a motion to enforce a subpoena is the “district where
17 compliance [with the subpoena] is required.” *See Music Grp. Macao Commercial Offshore Ltd. v.*
18 *Does*, 82 F. Supp. 3d 979, 983 (N.D. Cal. 2015).

19 Although the First Amendment protects the right to anonymous speech, the right to
20 anonymity is not absolute, and where such speech is unlawful (i.e. defamatory), the “speaker’s
21 right to remain anonymous may give way to a plaintiff’s need to discover the speakers identity in
22 order to pursue its claim.” *See Music Grp.*, 82 F. Supp. 3d at 983 (quoting *Art of Living Found. v.*
23 *Does 1-10*, No. 10-5022, 2011 WL 5444622, *3 (N.D. Cal. 2011)). The Ninth Circuit and the
24 Northern District of California have adopted a two part test for enforcement of subpoenas that seek
25 to discover the identity of an anonymous Internet user, (1) that the plaintiff “persuade the court that
26 there is a real evidentiary basis for believing that the defendant has engaged in wrongful conduct
27 that has caused real harm to the interests of the plaintiff,” and (2) once that showing has been
28 made, that the Court compare and balance the harms to the plaintiff and the harms (if any) to the

1 defendant. *See In re Anonymous Online Speakers*, 661 F.3d 1168, 1174-77 (9th Cir. 2011) (citing
2 *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005)).

3 The Ninth Circuit has indicated that the *Highfields* test is one of “middling rigor,”
4 appropriate where, “the challenged speech falls somewhere beneath the most protected realm of
5 ‘political, religious, or literary’ discourse; is, in significant part, commercial speech that enjoy
6 lesser protection; but may be more safeguarded than pure fighting words and obscenity, which is
7 not protected by the First Amendment at all.” *See Music Grp.*, 82 F. Supp. 3d at 983 (citing
8 *Anonymous Online Speakers*, 661 F.3d at 1173, 1175-76).

9 10 ARGUMENT

11 I. The Subpoena To Yelp Should Be Enforced Because Plaintiffs Have A Real 12 Evidentiary Basis For Believing That The Defendants Posted The Alleged 13 Wrongful Statements As They Have Made A Prima Facie Showing Of Defamation

14 Under the first prong of the *Highfields* “real evidentiary basis” test, a plaintiff is required
15 to make a prima facie showing of a claim by submitting “competent evidence” of each of the
16 elements of its claims in order to prevail under at least one of the causes of action the plaintiff
17 asserts. *Highfields*, 385 F. Supp. 2d at 975-76. The *Highfields* “real evidentiary basis” test is of
18 “middling rigor” that is less demanding than other tests (*See Music Grp.*, 82 F. Supp. 3d at 983)
19 and does not demand evidence that would be sufficient to survive a hypothetical dispositive
20 motion, but rather requires a demonstration that if un rebutted would support a finding of each of
21 the elements of a claim. *See Anonymous Online Speakers*, 661 F.3d at 1173, 1175-76.

22 Specifically, the Ninth Circuit has analogized the first prong of the *Highfields* test with the
23 good cause and *prima facie* showing the under Rule 26 motion that the underlying court used to
24 determine whether Plaintiffs should be permitted issue Rule 45 subpoenas. *Compare Anonymous*
25 *Online Speakers*, 661 F.3d at 1175 (“A number of courts have required plaintiffs to make at least a
26 prima facie showing of the claim for which the plaintiff seeks the disclosure of the anonymous
27 speaker's identity. *See, e.g., . . . Highfields Capital Mgmt., LP v. Doe*, 385 F. Supp. 2d 969 (N.D.
28 Cal. 2005); *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) [*“Sony*
Music”]) *with* (See Mercer Decl. at ¶ 6, Exhibit C) (SDNY Order) (citing cases applying *Sony*

1 *Music* test). Plaintiffs do not request that this Court supplant its determination for that of the
2 underlying court, however the record before the Court does demonstrate that Plaintiffs have, at a
3 minimum, met the threshold prong of the moderate *Highfields* test given it would not have had the
4 ability to conduct the discovery at issue without doing so—and prior to Dr. Mirza’s supplemental
5 demonstration and affidavit to Yelp. Even if the *Highfields* test did require more of Plaintiffs than
6 is required under the *Sony Music* test (*see, e.g., Art of Living Found.*, 2011 WL 5444622, *3), in
7 any event, Plaintiffs have met their burden under the first prong of the *Highfields* test.

8 In addition to other claims, Plaintiffs’ Second Amended Complaint has alleged a *prima*
9 *facie* case of defamation *per se* under New York law. In order to make a *prima facie* case for
10 defamation under New York law, a plaintiff must show “1) a false and defamatory statement of
11 and concerning the plaintiff; 2) publication by defendant of such a statement to a third party; 3)
12 fault on part of the defendant; and 4) injury to plaintiff.” *Idema v. Wager*, 120 F. Supp. 2d 361,
13 365 (S.D.N.Y. 2000), *aff’d*, 29 F. App’x 676 (2d Cir. 2002). Statements which tend to injure a
14 person in their business or profession are actionable as defamatory *per se* without a showing of
15 special damages. *See id.*; *see also* California Civil Code § 45 (“Libel is a false and unprivileged
16 publication by writing, printing, picture, effigy, or other fixed representation to the eye, which
17 exposes any person to hatred contempt, ridicule, or obloquy, or which causes him to be shunned
18 or avoided, or *which has a tendency to injury him in his occupation.*”)(emphasis added).

19 The Second Amended Complaint sets forth the actual statements at issue, which include
20 statements accusing Dr. Mirza of practicing and engaging in “fraud” by *inter alia* using “fake
21 botox” and unlawfully mixing improper chemicals or “filler” with his injections for cosmetic
22 applications, being a “scam artist,” and, not actually being a licensed medical doctor. *See* SAC at
23 ¶¶ 22-96 (Exhibit B). Further, Plaintiffs have provided evidence to Yelp, in the form of, *inter*
24 *alia*, Dr. Mirza’s affidavit. *See* Mirza Aff. at Mercer Decl., Exhibit F. That evidence
25 demonstrates that the statements are provably false. For instance, in addition to calling Plaintiffs
26 a “scam artis[t],” at least one John Doe accuses Plaintiffs of (a) “do[ing] harm to you”; (b) putting
27 “filler in [their] face that was not filler”; (c) “inject[ing] things [Dr. Mirza] should not”; and (d)
28 engaging in fraudulent business practices by allegedly directing others to post fake, positive

1 reviews about Plaintiffs. Dr. Mirza's affidavit demonstrated these statements are provably false
2 because he "is a licensed and experienced medical profession" and claimed he is not a "scam
3 artist." Mirza Aff.; *See als* SAC at ¶¶ 48, 83.

4 Similarly, as alleged in the Complaint, while Plaintiffs are not familiar with who the Does
5 are, as of the date of their reviews (nor any time before or after), have Plaintiffs not "done harm"
6 to their patients, used fake, diluted or any product that was anything but genuine filler and/or
7 authentic materials obtained directly from the manufactures of same. *See, e.g.*, SAC at ¶¶ 28, 34,
8 41, 48, 83. To engage in the conduct alleged in the Does' statements would jeopardize not only
9 the integrity of Plaintiffs' medical practice, but would subject them to serious disciplinary
10 action—the like of which they have never had, otherwise Dr. Mirza would not be practicing
11 medicine today.

12 Based upon the allegations and affidavit submitted by Dr. Mirza to Yelp and reiterated
13 herein again, Plaintiffs have put forth evidence to support a claim of defamation *per se* and have
14 thus met the first prong of the moderate *Highfields* test. Accordingly, Yelp's refusal to disclose
15 the remaining Doe Defendants' identities lacks merit and it should be compel to provide
16 Plaintiffs with that information forthwith.¹

17
18 **II. The Subpoena To Yelp Should Be Enforced Because Disclosure Of The Speakers'**
19 **Identities Would Cause Relatively Little To No Harm To Their First Amendment**
Or Privacy Rights

20 The second prong of the *Highfields* test provides that, if a plaintiff issuing a subpoena is
21 able to make a sufficient evidentiary showing to satisfy the first prong, the Court must balance the
22 harms to each party potentially suffered by a ruling in favor or against disclosure. *Highfields*, 385
23 F. Supp. 2d at 980. Here, Plaintiffs have clearly met the second prong.

24 The motion to enforce should be granted because permitting discovery of the identity of

25 ¹ Given that Yelp produced some information about three of the Does notwithstanding their other
26 objections set forth in the Yelp First Response, Plaintiffs only address the First Amendment and
27 *Highfields* issues raised by Yelp in their Second Response. Should Yelp oppose this motion on
28 any of the other objections set forth therein, Plaintiffs respectfully reserve the right to raise and
rebut these issues on reply. Alternatively, should the Court seek additional briefing on those
remaining objections (with or without a response from Yelp)—which Plaintiffs believe also lack
merit—Plaintiffs will promptly do so.

1 the anonymous speakers will afford Plaintiffs the opportunity to continue to litigate its claims of
2 wrongful conduct. Plaintiffs have “no recourse for these statements if the Court does not allow it
3 to pursue the identities of the Doe Defendants.” *See OBI Pharma, Inc. v. Does 1-20*, Case No.
4 16-CV-2218 H (BGS) (S.D. Cal. April 27, 2017) (finding plaintiff in defamation case met the
5 second prong of the Highfields test where disclosure was needed to identify anonymous online
6 speakers and noting that “it is questionable whether these posts are entitled to any First
7 Amendment protection.”). Furthermore, as set forth in the Complaint, Plaintiffs have alleged
8 and submitted evidence (i.e. the Mirza Aff.) which demonstrates that the intended and resulting
9 effect of the false statements has been to dissuade Plaintiffs’ patients and customers from doing
10 business with them. *See* SAC at ¶¶ 92-96.

11 Further, disclosure of anonymous online speakers is appropriate where, as here, the
12 statements are likely to be taken seriously, are intended and understood to be factual, and will
13 cause harm to Plaintiffs’ business and reputation. Yelp is a platform where business promote
14 themselves and where consumers use go to read and see, ostensibly true statements about those
15 promoted-businesses’ conduct. As alleged in the Complaint, the Defendants drafted their
16 statements in such a fashion that no reasonable person would believe that the statements made
17 therein were opinion, but rather statements of fact about Plaintiffs. *See, e.g.*, SAC at ¶ 24. Under
18 these circumstances, the harm intended by Defendants unto Plaintiffs—by fashioning quasi-
19 factual, but demonstrably false, statements—outweighs any claim to anonymity and privacy that
20 the Defendants may have. *See OBI Pharma, Inc.*, Case No. 16-CV-2218 H (BGS) (S.D. Cal.
21 April 27, 2017) (“Comparing the magnitude of the harms to Plaintiff and the Doe Defendants in
22 disclosing or not disclosing the Doe Defendants’ identities, the Court concludes the Doe
23 Defendants would be subjected to relatively little harm to their First Amendment privacy rights by
24 disclosure, assuming they have any for these statements, and Plaintiff would suffer significant
25 harm in being denied any remedy for the libelous statements.”).

26 Finally, while Plaintiffs are and have been unable to specifically identify the Does based on
27 the Yelp user name accounts they used, the Defendants may not in fact, be “anonymous” as their
28 accounts names could be the Defendants’ real first names and the first initial of their last name

1 (like "Doris B.")—vitiating any claim to complete anonymity. Accordingly, the balance of harms
2 tips decidedly in Plaintiffs' favor, and Plaintiffs have clearly met the second prong of the
3 *Highfields* test.

4 CONCLUSION

5 Based on the foregoing, and the papers submitted by Plaintiffs in connection with the same,
6 Plaintiff respectfully requests that this Court grant (i) their motion to enforce the subpoena on non-
7 party Yelp, and (ii) such other relief to Plaintiffs as the Court deems proper.

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10 DATED this 30th day of May, 2019.

Respectfully submitted,

THOITS LAW

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13 By:



Michael Hsueh

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15 David D. Lin (*pro hac vice* forthcoming)

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